SUPREME COURT, U. S.

FILED

SEP 15 1969

JOHN F. DAVIS, CLERK

No. 590

IN THE

Supreme Court of the United States

RALPH J. PERK, Cuyahoga County Auditor,
Appellant,

v.

THE STATE OF OHIO, ON THE RELATION OF JOHN T. CORRIGAN, PROSECUTING ATTORNEY OF CUYAHOGA COUNTY, OHIO,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

JURISDICTIONAL STATEMENT

POWER, GRIFFITH, JONES & BELL,
By GERALD A. DONAHUE,
STANLEY S. SMITH,
100 East Broad Street,
Columbus, Ohio 43215
DONALD M. ROBINER,
METZENBAUM, GAINES, FINLEY & STERN,
700 Union Commerce Building,
Cleveland, Ohio 44115
WILLIS J. ZANGERLE,
11309 Edgewater Drive,
Cleveland, Ohio
Attorneys for Appellant.

JOHN T. CORRIGAN,
Prosecuting Attorney,
JOHN L. DOWLING AND A. M. BRAUN,
Assistant Prosecuting Attorneys,
Attorneys for Appellee.

MIDWEST LAW PRINTERS AND PUBLISHERS, Columbus, Ohio 43216

INDEX

	Page
Jurisdictional Statement	1
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	3
The Questions Are Substantial	6
Appendix A	17
Appendix B	32

CITATIONS

Cases:

Baker v. Carr, 369 U.S. 186 (1962)	12
Blackwell v. Bachrach, 143 N.E. 2d 127 (1957)	8
Brown v. Board of Education, 347 U.S. 483 (1954)	10
DeJonge v. Oregon, 299 U.S. 353 (1937)	2, 9
Douglas v. California, 372 U.S. 353 (1963)	2, 10
Gray v. Sanders, 372 U.S. 368 (1963)	12
Harper v. Virginia Board of Elections, 383 U.S. 663 (1966)	14
Herndon v. Lowry, 301 U.S. 242 (1937)	9
Cipriano v. City of Houma, 89 S. Ct. 1897 (1969)	2, 13
Kramer v. Union Free School District, 89 S. Ct. 1886 (1969)	2, 13, 14
Lane v. Wilson, 307 U.S. 268 (1939)	10
NAACP v. Button, 371 U.S. 415 (1963)	8
NAACP v. State of Alabama ex rel. Patterson, 357 U.S. 449 (1958)	8
Reynolds v. Sims, 377 U.S. 533 (1964)	12
State ex rel. Buchanon v. Stillman, 231 N.E. 2d 61 (1967)	8
State ex rel. Patton v. Meyers, 186 N.E. 872 (1933)	8

Strauder v. West Virginia, 100 U.S. 303 (1880) .. 10
United Mine Workers, Dist. 12 v. Ill. State Bar Assn., 389 U.S. 217 (1967) 2, 8
Wesberry v. Sanders, 376 U.S. 1 (1964) 12
Williams v. Rhodes, 393 U.S. 23 (1968) 2, 6, 9, 10, 11, 13
Yick Wo v. Hopkins, 118 U.S. 356 (1886) 10

Statutes:

Ohio Const., Art. II, §1g 2, 3, 6, 11
Ohio Const., Art. V, §1 6
Ohio Revised Code, §305.31 .....2, 3, 4, 5, 6
Ohio Revised Code, §305.32 .....2, 3, 4, 5, 6, 11, 12
Ohio Revised Code, §5739.021 3

IN THE

Supreme Court of the United States

October Term, 1969

No. ____

RALPH J. PERK, Cuyahoga County Auditor,
Appellant,

v.

THE STATE OF OHIO, ON THE RELATION OF JOHN T. CORRIGAN, PROSECUTING ATTORNEY OF CUYAHOGA COUNTY, OHIO,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of Ohio, allowing a Writ of Prohibition, entered on June 18, 1969; and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Supreme Court of Ohio, allowing a Writ of Prohibition against this Appellant is reported in 19 Ohio St. 2d 1 (1969). Copies of the entry allowing the Writ of Prohibition and the Opinion of the Supreme Court of Ohio are attached hereto as Appendix A.

JURISDICTION

This was an original action, in Prohibition, brought in the Supreme Court of Ohio by John T. Corrigan, Prosecuting Attorney for Cuyahoga County, Ohio, pursuant to Ohio Sup. Ct. R. VIII. The judgment of the Supreme Court of Ohio was entered on June 18, 1969, and a notice of appeal to the Court, was filed in the Supreme Court of Ohio on July 18, 1969. The jurisdiction of the Supreme Court to review this decision by appeal is conferred of Title 28, United States Code, Section 1257 (2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Williams v. Rhodes*, 393 U.S. 23, 21 L.Ed 2d 24, 89 S. Ct. 5 (1968); *Kramer v. Union Free School District*, 89 S. Ct. 1886, 37 LW 4530 (1969); *Cipriano v. City of Houma*, 89 S. Ct. 1897, 37 LW 4598 (1969); *United Mine oWrkers, Dist. 12 v. Illinois State Bar Assn.*, 389 U.S. 217, 19 L. Ed. 2d 426, 88 S. Ct. 353 (1967); *DeJonge v. Oregon*, 299 U.S. 353, 81 L. Ed. 278, 57 S. Ct. 255 (1937); *Douglas v. California*, 372 U.S. 353, 9 L. Ed. 2d 811, 83 S. Ct. 814 (1963).

QUESTIONS PRESENTED

1. Is a registered voter denied his right "peacebly to assemble, and to petition the Government for a redress of grievances", and is the electorate as a whole denied the "right to vote" by the requirement that voters designate their ward and precinct on a referendum petition, in violation of the First and Fourteenth Amendments of the Constitution of the United States?

2. Is a registered voter denied "equal protection of the laws" when the Ohio Constitution and Sections 305.31 and 305.32, Ohio Revised Code, require a voter living in a designated ward and precinct to place same on a referendum

petition but place no similarly burdensome requirement on a voter not living in a designated ward and precinct?

STATUTES INVOLVED

Ohio Constitution, Article II, Section 1g; Ohio Revised Code Sections 305.31 and 305.32; are set forth in Appendix B hereto.

STATEMENT

On February 10, 1969, there was duly introduced, at a meeting of the Board of County Commissioners of Cuyahoga County, Ohio, by one of the members of said Board, a resolution entitled: "A resolution levying a county sales tax of one-half of one per cent pursuant to Chapter 5739 and particularly Section 5739.021 of the Revised Code of Ohio." The Board of County Commissioners, pursuant to aforesaid resolution, adopted resolutions authorizing public hearings and publication of the notice thereof on the proposed levy of the county sales tax.

Pursuant to notices published in the Cleveland Plain Dealer, a newspaper of general circulation in Cuyahoga County, Ohio, public hearings were held on March 3, 1969, and March 10, 1969. On March 10, 1969, after the public hearings, a member of the Board moved that the resolution proposing the county sales tax be brought up for consideration by the Board of County Commissioners; the resolution was then considered and unanimously adopted by the Board.

Thereafter, by virtue of Section 305.31 et seq. of the Ohio Revised Code, petitions seeking a referendum on the question on the county sales tax were circulated in Cuyahoga County, a county in which every elector resides in a designated precinct but one in which not all electors reside in

designated wards and precincts. Under Section 305.31, Revised Code, 47,000 valid signatures were required to place the referendum issue on the ballot in Cuyahoga County at the general election to be held on November 4, 1969.

Within the time prescribed by law, part petitions seeking the referendum were filed with the appellant, the County Auditor. The part petitions contained 76,000 signatures; Section 305.32 of the Ohio Revised Code requires the placement on the petitions of the ward and precinct of the signers. The part petitions, as filed with appellant County Auditor, contained the ward and precinct of only 10,000 of the signers of the part petitions.

The appellant County Auditor thereafter estimated the cost of checking the validity of signatures on the referendum petitions and the Board of County Commissioners increased the appropriation of the appellant. The appellant turned the part petitions over to the Director of the Cuyahoga County Board of Elections with the instruction to count all valid signatures of electors whether or not the ward and precinct were listed on the petitions.

Thereafter, the appellee County Prosecutor, advised the appellant that signatures on the referendum petitions which are not followed by the ward and precinct are not valid under Ohio law. Appellee alleged that counting any signatures is unauthorized and an illegal act and advised appellant to cease and desist. Appellant, however, responded that Section 305.32, Ohio Revised Code violates the Constitution of the United States and that he was not able to obey said law or otherwise violate the Constitution.

The appellee thereupon sought an alternative writ of prohibition from the Supreme Court of Ohio restraining the appellant County Auditor from attempting to validate

the signatures on the referendum petitions. The Cuyahoga County Board of Elections and the Director of Elections were joined as respondents because they had voted to participate in validating the signatures.

On May 8, 1969, the Supreme Court of Ohio granted an alternative writ of prohibition and ordered respondents to show cause why they should not be permanently prohibited. Thereafter this appellant (and the other respondents below) filed a Motion to Refer the matter to a Master Commissioner for the purpose of taking testimony. This motion was filed specifically for the purpose of deducing testimony upon which an argument can be made that Sections 305.31 through 305.99 Revised Code, are in violation of the Fourteenth Amendment of the Constitution of the United States. This motion was denied. A Motion for Summary Judgment was filed which was overruled also.

The respondents below (including appellant) thereafter responded to the order to show cause why the writ of prohibition should not be made permanent. In their answer respondents alleged, in defense, that Sections 305.31 and 305.32, Ohio Revised Code, are in violation of the Fourteenth Amendment; the same issue was extensively briefed in respondent's brief filed with the Supreme Court of Ohio.

The Supreme Court of Ohio unequivocably passed upon the constitutionarily of Article II, Section 1g and Sections 305.31 and 305.32, Ohio Revised Code, when in its opinion, at page 3 thereof, (attached as Appendix A hereto) it states:

> "* * *. Unless such a requirement contravenes the Federal Constitution, it must stand as a valid expression of the will of the people in the exercise of their right of self-government, irrespective of what this court may think of its wisdom or necessity.
> "We find no Federal Constitutional provision or prin-

ciple which is offended by the requirements of Section 1g of Article II of the Ohio Constitution or Section 305.32, Revised Code, that ward and precinct appear on referendum petitions. * * *."

This decision of the Supreme Court of Ohio was concurred in by five justices thereof; two justices, O'Neil and Duncan, dissented and their dissenting opinions are also set forth in Appendix A hereto.

The order of the Supreme Court of Ohio, allowing the Writ of Prohibition, was entered June 18, 1969. The Notice of Appeal to this Court was filed in the Supreme Court of Ohio on July 18, 1969.

THE QUESTIONS ARE SUBSTANTIAL

The Ohio Constitution, Article V, Section 1 provides that every citizen of the United States who has been a resident of the state for one year preceding the election shall be entitled to vote at elections. The Ohio Constitution, Article II, Section 1 also reserves to the people of the state the right of referendum. Section 305.31, Ohio Revised Code, specifically grants the right of referendum on a permissive tax resolution adopted by a board of county commissioners. However, these rights to petition for referendum and to vote must be effective or the "right" becomes meaningless. If the state attaches, as a condition precedent to these rights, a burdensome requirement on the elector and one which cannot be fulfilled in the majority of instances, then the state has, in effect, taken away a citizen's right to vote and his right to associate "for the advancement of political goals. . . ." *Williams v. Rhodes*, 393 U.S. 23; 21 L. Ed. 2d 24; 89 S. Ct. 5 (1968).

In the instant case, the right of *all* qualified voters of Cuyahoga County (the most populous county in Ohio) to express their opinion at a referendum election on the vital

question of an additional permissive sales tax proposed to be levied and collected in Cuyahoga County, Ohio, has been effectively denied on the basis that the referendum petitions which sought to place the issue on the ballot did not contain the ward and precinct designation of the otherwise qualified signers thereof. Further, the First Amendment rights of over 66,000 signers of the referendum petitions have been rendered completely ineffective and therefore meaningless. All of these rights have been deprived for want of a technicality, i.e. ward and precinct designations—a requirement for which no purpose was ever suggested to the Ohio Supreme Court, nor did the Ohio Supreme Court cite any in its opinion, other than the bare existence of the requirement in the Constitution and statutes of the State of Ohio.

1. It was stipulated at bar that the electors in Cuyahoga County do not know the number and/or name of the ward and precinct in which they live. Furthermore there is no basis upon which to believe that the electors in any other county in the State of Ohio are more knowledgeable. The Supreme Court of Ohio has said, however, that requirements that an elector place his ward and precinct on a referendum petition is a mandatory requirement. Such a requirement, to stand the test of constitutionality, must find a basis in public policy and must furthermore be a reasonable requirement. There is no question but that the requirement has denied the electors of Cuyahoga County the right to vote on the tax issue.

The Supreme Court of Ohio, in its opinion, did not advance any rational basis for finding this requirement to be mandatory. It was conceded by all parties that the Board of Elections in Cuyahoga County maintains the list of registered voters in the county with their names in alpha-

betical order. It was also conceded that the same list contained the ward and precinct, if any, of each registered voter. It was also conceded that the Board of Elections, in order to check whether or not a person was a registered voter, does not need that person's ward and precinct number. There was no allegation that the requirement would prevent fraud. The Supreme Court of Ohio in the case of *State, ex rel. Buchanon v. Stillman*, 12 Ohio St. 2d 13; 231 N.S. 2d 61 (1967), held that where information which was *omitted* from an election petition was contained within the records of the Board of Elections, the omission is not fatal. Another case with a like result was *Blackwell v. Bachrach*, 166 Ohio St. 301, 143 N.E. 2d 127 (1957). Further, the Ohio Supreme Court acknowledged that it had previously ruled in *State ex rel Patton v. Myers*, 127 Ohio St. 95, 186 N.E. 872, that "matters other than the signer's own name need not be personally affixed by the signer to a referendum petition." Thus, the information for want of which these petitions were rejected, could have been furnished by others, and, in fact, the Board of Elections has such information in its own records and could have easily determined same, if some purpose would have been served. The only conclusion is that the requirement is designed to curb, by inserting a meaningless ritual, the use of the right of referendum on a local tax issue.

By not establishing a compelling state interest for its ballot restrictions, Ohio is denying its citizens the right to vote and also abridging the First Amendment associational rights of a large segment of its citizenry. *United Mine Workers Dist. 12 v. Illinois State Bar Assn.*, 389 U.S. 217, 19 L. Ed. 2d 426, 88 S. Ct. 353 (1967); *NAACP v. Button*, 371 U.S. 415, 9 L. Ed. 2d 405, 83 S. Ct. 328 (1963); *NAACP v. State of Alabama ex rel. Patterson*, 357 U.S. 449, 2 L. Ed. 2d 1488, 78 S. Ct. 1163 (1958). And such abridgment is in

contravention of the mandate of the "due process" clause of the Fourteenth Amendment to the United States Constitution. *DeJonge v. Oregon*, 299 U.S. 353, 81 L. Ed. 278, 57 S. Ct. 255 (1937); *Herndon v. Lowry*, 301 U.S. 242, 81 L. Ed. 1060, 57 S. Ct. 732 (1937).

For support of his claim appellant draws upon the most recent and authoritative decision of the United States Supreme Court dealing with these rights, *Williams v. Rhodes*, infra. The analogy between that case and this is striking. Here, as there, we have a right to exercise the franchise extended by the state. In *Williams*, infra., it was the right to vote for or against candidates for President of the United States. Here it is the right to vote for or against county taxes. Here as there we have a large group of electors who have joined together to support and gain a political end. In *Williams*, infra., the goal was that of placing former Governor George Wallace's name on the ballot. Here the goal was to place the issue over the one and one-half per cent sales tax on the ballot. Here as there we have heavily burdensome state laws governing the ballot which effectively deny these two "political parties" *any* opportunity of effecting their respective goals. In *Williams*, infra., the state required a complicated party machinery, plus an unduly large representation of *signed* membership to be demonstrated at an unusually early date (nine months prior to the general election). Here as already demonstrated, a meaningless unperformable ritual was imposed upon all who wished to join in the political movement. And here as there the net result of these laws was to deny the electorate the opportunity of deciding the issues by the exercise of the franchise. Thus, the words of Justice Black in his majority opinion in *Williams*, infra., should control the decision in this case as well. On page 30 the court states:

> "The right to form a party for the advancement of political goals means little if a party can be kept off the election ballots and thus denied an equal opportunity to win votes. So also, the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot. In determining whether the State has power to place such unequal burdens on minority groups where rights of this kind are at stake, the decisions of this court have consistently held that 'only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms' *NAACP v. Button*, supra., at 438, 9 L. Ed. 2d. 42.
> "The State has here failed to show any 'compelling interest' which justifies imposing such heavy burdens on the right to vote and to associate."

2. The Fourteenth Amendment to the Constitution of the United States prohibits the State of Ohio from denying any person within its jurisdiction the equal protection of the law. *Douglas v. California*, 372 U.S. 353, 9 L. Ed. 2d 811, 83 S. Ct. 814 (1963); *Brown v. Board of Education*, 347, U.S. 483, 98 L. Ed. 873, 7 S. Ct. 686 (1954); *Strauder v. West Virginia*, 100 U.S. 303, 25 L. Ed. 664 (1880); *Yick Wo v. Hopkins*, 118 U.S. 356, 30 L. Ed. 220, 6 S. Ct. 1064 (1886); *Lane v. Wilson*, 307 U.S. 268, 83 L. Ed. 1281, 50 S. Ct. 872 (1939). The method, laid down in those cases, for determining whether or not there has been a violation has also been declared in *Williams v. Rhodes*, infra. At page 29 the Court states:

> "But we have also held many times that 'invidious' distinctions cannot be enacted without a violation of the Equal Protection Clause.[4] In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances of the law, the interests which the State claims to be protecting, and interest of those who are disadvantaged by the classification.[5] In the present situation the state laws place burdens on two different, although over-

> lapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively."

As already shown, these same rights are being unduly burdened again by Ohio in this present situation; but unlike *Williams,* infra. the state has not claimed to be protecting any interest at all by these statutory burdens. Therefore, appellant contends that the requirement concerning ward and precinct in the Ohio Constitution and in Section 305.32, Ohio Revised Code, denies equal protection of the laws to a large number of Ohio citizens.

Section 305.32 states that each signer must place on the petition his ward and precinct, *if any.* Article II, Section 1g of the Ohio Constitution states that each signer, outside a municipality, must place on the petition his township and county; a resident of a municipality must state his ward and precinct, *if any.* These sections obviously assume there are instances in which an elector will not have a ward and precinct. The Ohio Constitution specifically states that signers outside a municipality need only state their township and county—not their ward and precinct even though such a township and county may also have a ward and precinct. In this case some potential signers of these referendum petitions who lived outside the city limits of a municipality in Cuyahoga County need only state their township and county; even though they actually lived in an area designated with ward and precinct numbers. The resident-signer living in Cleveland, Ohio, is required to state his ward and precinct. When this paradox is considered in light of the fact that no one knows his ward and precinct designations and everyone knows his township and county, the inequality is obvious. Consider also the fact that some counties in Ohio are non-registration counties.

Section 305.32, Revised Code, requires a person in a rural area of such a county to place a long distance call to the board of elections or to travel a long distance to the county seat to find out his ward and precinct number.

The effectiveness of an elector's act of signing a referendum petition therefore, depends upon where the elector resides. And this fact designates Ohio's law, herein, as violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution. This principle is clearly at the heart of myriads of apportionment cases decided by the Supreme Court since *Baker v. Carr,* 396 U.S. 186, 7 L. Ed. 2d 663, 82 S. Ct. 691 (1962). *Gray v. Sanders,* 372 U.S. 368, 9 L. Ed. 2d 821, 83 S. Ct. 801 (1963); *Wesberry v. Sanders,* 376 U.S. 1, 11 L. Ed. 2d 481, 84 S. Ct. 526 (1964); *Reynolds v. Sims,* 377 U.S. 533, 12 L. Ed. 506, 84 S. Ct. 1362 (1964). The words of Chief Justice Warren in his majority opinion in *Reynolds v. Sims,* infra., seems most applicable, wherein at page 567 the Court states:

> "The complexions of societies and civilizations change, often with amazing rapidity. A nation once primarily rural in character becomes predominantly urban. Representation schemes once fair and equitable become archaic and outdated. But the basic principle of representative government remains, and must remain, unchanged—the weight of a citizen's vote cannot be made to depend upon where he lives."

Nor should the validity of an elector's signature on a petition to secure him such a right to vote "be made to depend upon where he lives."

On June 16, 1969, just two days prior to the Ohio Supreme Court's decision in the within case, this Court decided two further significant cases involving the validity of certain state statutes restricting the right of franchise, which we believe also pertinent to the issues herein:

Kramer v. Union Free School District, No. 15, et al, 89 S. Ct. 1886, 37 LW 4530; *Cipriano v. City of Houma*, 89 S. Ct. 1897, 37 LW 4598. In *Kramer* this Court considered the constitutionality of a provision of the New York Education Law restricting the right of certain residents otherwise eligible to vote to those who owned or leased taxable real property within a school district or to those who were parents or persons having custody of the children enrolled in the public schools. That action was brought by a bachelor who lived with his parents and who neither owned nor leased taxable property. He claimed that the provision denied him the equal protection of the law in violation of the Fourteenth Amendment.

In holding the challenged provision unconstitutional, this Court set forth, at page 1889, that:

"The sole issue in this case is whether the additional requirements . . . which prohibit some district residents who are otherwise qualified by age and citizenship from participating in district meetings and school board elections —violate the Fourteenth Amendment's command that no state shall deny persons equal protection of the laws."

In *Kramer*, as in the instant action, the requirements of age, residency and citizenship were not challenged.

This Court continued by quoting from *Williams v. Rhodes*, 393 U. S. 23, 30 (1968) that the 'interests which the state claims to be protecting and the interest of those who are disadvantaged by the classification' must be considered in a determination as to a violation of the equal protection clause, and that,

"Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government."

Further, the Court held, at 1890, that:

". . . the deference usually given to the judgment of legislators does not extend to decisions concerning which resident citizens may participate in the election of legislators and other public officials. Those decisions must be carefully scrutinized by the Court to determine whether each resident has, as far as is possible, an equal voice in the selections. Accordingly, when we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a 'rational basis' for the distinctions made are not applicable."

That the question in the instant case involves the exercise of the right of referendum does not detract from this Court's previous holdings. As the Court stated in *Harper v. Virginia Board of Elections*, 383 U. S. 663, 670 (1966). quoted approvingly in *Kramer*, supra, at 1890:

"Once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."

Significantly, in *Kramer*, the State of New York at least put forward purported compelling state interests in support of the restriction then before this Court. No such compelling state interest was even suggested in the instant action, nor any interest at all for that matter, nor was any found by the Supreme Court of Ohio. Rather, the Ohio Supreme Court based its decision upholding the constitutionality of the requirements solely upon their *mere presence in the Ohio Constitution*. Surely, no law can be justified merely because it exists.

It is therefore submitted that the decision of the Supreme Court of Ohio is in error and that this error is so funda-

mental to the duties of appellant's offices, to the rights of appellants as citizens of the State of Ohio and the United States, and to the rights of all citizens of the State of Ohio and the United States that they deem it worthy of consideration by this court.

Respectfully submitted,
POWER, GRIFFITH, JONES & BELL

By Gerald A. Donahue
GERALD A. DONAHUE

By
STANLEY S. SMITH

100 East Broad Street
Columbus, Ohio 43215
Phone—614-221-7863

DONALD M. ROBINER
METZENBAUM, GAINES, FINLEY
& STERN
700 Union Commerce Building
Cleveland, Ohio 44115

WILLIS J. ZANGERLE
11309 Edgewater Drive
Cleveland, Ohio
Counsel for Appellant.

APPENDICES

APPENDIX A

THE SUPREME COURT OF THE STATE OF OHIO

No. 69-307

THE STATE OF OHIO
City of Columbus.
1969 Term

To wit: Wednesday, June 18, 1969

THE STATE OF OHIO, EX REL. JOHN T. CORRIGAN, PROSECUTING ATTORNEY,

Relator,

vs.

RALPH J. PERK, COUNTY AUDITOR, ET AL., BOARD OF ELECTIONS OF CUYAHOGA COUNTY,

Respondents.

IN PROHIBITION

This cause originated in this Court upon the filing of a petition for a writ of prohibition seeking to prevent the Auditor, Board of Elections and Director of Elections of Cuyahoga County from counting or validating part petitions for referendum on Cuyahoga County one-half of one per cent sales and use tax resolutions, adopted by the Board of County Commissioners, which do not contain the ward and precinct of the signers as required by Section 305.32, Revised Code, or from expending public assets for such purpose. Briefs being filed by both parties, this cause was heard in the manner prescribed by law. On consideration thereof, the writ of prohibition is hereby allowed for the reasons set forth in the opinion rendered herein.

It is further ordered that the relator recover from the respondents costs herein expended.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. ..... Page .....

In Witness Whereof, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 18th day of June, 1969.

THOMAS L. STARTZMAN, *Clerk.*
By /s/ SAM F. ADKINS, *Deputy.*

OPINION

This is an original action in this court seeking a writ of prohibition to prevent the Auditor, Board of Elections and Director of Elections of Cuyahoga County from counting or validating part petitions for referendum on Cuyahoga County one-half of one per cent sales and use tax resolutions, adopted by the Board of County Commissioners, which do not contain the ward and precinct of the signers as required by Section 305.32, Revised Code, or from expending public assets for such purpose.

An insufficient number of the part petitions to place the referendum issue on the ballot contain the ward and precinct of the municipal signers. The Cuyahoga County Board of Elections, by a split vote, has determined to proceed with the count, and the County Auditor has instructed the Director of Elections to determine the validity of the signatures on the assertedly defective part petitions.

The facts are not in dispute. The cause is submitted to the court for decision upon the merits.

Mr. John T. Corrigan, prosecuting attorney, *Mr. John L. Dowling* and *Mr. A. M. Braun*, for relator.

Messrs. Power, Griffith, Jones & Bell, Mr. Gerald Donat

hue, Messrs. Metzenbaum, Gaines, Krupansky, Finley & Stern, Mr. Robert B. Krupansky, Mr. Donald Robiner and *Mr. Willis J. Zangerle*, for respondents.

Per Curiam. Section 1*g* of Article II of the Ohio Constitution provides in pertinent part:

"* * * Each signer of any * * * referendum petition must be an elector of the state and shall place on such petition after his name the date of signing and his place of residence. A signer residing outside of a municipality shall state the township and county in which he resides. A resident of a municipality shall state in addition to the name of such municipality, the street and number, if any, of his residence and the ward and precinct in which the same is located. * * *"

Section 305.32 of the Revised Code provides in part:

"* * * Each signer of any such [referendum] petition must be an elector of the county in which the election, upon the resolution referred to by such referendum petition, is to be held, and shall place on such petition, after his name, the date of signing, his place of residence, including street and number, if any, and the ward and precinct, if any. * * *"

The first paragraph of the syllabus of *Lynn v. Supple* (1957), 166 Ohio St. 154, 140 N.E. 2d 555, reads:

"Where an applicable statute provides that 'each signer of * * * [a referendum] petition * * * *shall* place on such petition * * * [his] ward and precinct,' it is essential to the validity of a signature on such a petition of an elector of a municipality where registrations are by precincts that such signature be followed by the correct precinct of the signer. (*State, ex rel Pope v. Addison et al., Council*, 132 Ohio St. 477, followed.)" (Emphasis original.)

In an opinion "by the court" in *State, ex rel. Poor, v. Addison* (1937), *supra* at 481, 9 N.E. 2d 148, it is stated:

"* * * the law is clear that the ward and precinct, whether written in by the signer himself or by someone else under his direction, must follow the signature of the signer in a petition * * *."

In the face of the foregoing authority, respondents argue that the requirement that ward and precinct appear on referendum petitions serves no useful purpose and is an unreasonable burden upon the constitutional right of referendum. They further advocate that the word "shall" as used in Section 305.32, Revised Code, must be construed as "should" or "may". Finally, they assert that this court has declared Section 1*g* of Article II of the Ohio Constitution applicable only to state-wide legislation, thereby rendering it devoid of authority in this case. (*See, e.g.: Dillon v. Cleveland* (1927), 117 Ohio St. 258, 158 N.E. 606.)

Irrespective of whether Section 1g governs only state-wide referendum, which need not be decided here, its presence in the Constitution clearly demonstrates that the people considered ward and precinct requirements to be of sufficient importance to directly include them in their fundamental law, if only for state-wide issues. Unless such a requirement contravenes the federal Constitution, it must stand as a valid expression of the will of the people in the exercise of their right of self-government, irrespective of what this court may think of its wisdom or necessity.

We find no federal constitutional provision or principle which is offended by the requirements of Section 1*g* of Article II of the Ohio Constitution or Section 305.32, Revised Code, that ward and precinct appear on referendum petitions. Our ruling in *State, ex rel. Patton v. Myers* (1933), 127 Ohio St. 95, 186 N.E. 872, that matters other

than the signer's own name need not be personally affixed by the signer to a referendum petition under Section 1*g*, minimizes the argument that such a requirement is an unreasonable burden upon the individual signer. We conclude that a statute which follows a requirement clearly laid down by the people and extends this requirement to local issues must be considered mandatory and constitutionally valid. Accordingly, those signatures of municipal residents which were filed with respondent Perk without ward and precinct designations, are invalid. Since an insufficient number of valid signatures remains to allow placement of the issue on the ballot, even if all remaining were to be determined valid, the writ of prohibition is allowed.

Writ allowed.

TAFT, C.J., GRAY, MATTHIAS, SCHNEIDER and HERBERT, J.J., concur.

O'NEILL and DUNCAN, J.J., dissent.

GRAY, J., of the Fourth Appellate District, sitting for ZIMMERMAN, J. Because of the inability, "by reason of illness" of JUSTICE CHARLES B. ZIMMERMAN "to hear, consider and decide" this case, JUDGE GRAY of the Court of Appeals was, pursuant to Section 2 of Article IV of the Constitution of Ohio, duly directed by the Chief Justice "to sit with the justices of the Supreme Court in the place and stead of" JUSTICE ZIMMERMAN, and JUDGE GRAY did so and heard and considered this cause prior to the decease of JUSTICE ZIMMERMAN on June 5, 1969.

O'NEILL, J., dissenting. I concur in the dissenting opinion of Justice Duncan.

The instant action is in prohibition. The relator seeks an order from this court which would deny to the electorate of Cuyahoga County the right to vote on the question of

whether local county-wide sales and use taxes, enacted by the county commissioners for local government purposes, shall be levied upon the citizens of Cuyahoga County.

The sole ground upon which the relator asks this court to deny the electorate of Cuyahoga County their right to vote upon that question is that the wards and precincts in which some of the signers of these referendum petitions reside do not appear upon the petitions.

This is an attempt to deny the right of the people to vote on a local tax for local government purposes, based upon a meaningless super-technicality.

No question is raised about the validity of the signatures upon the petitions, and none is raised about the accuracy of the address of any petition signer. The address of an elector, of course, determines the ward and precinct in which he resides.

No question is raised concerning the Cuyahoga County residence of any petition signer.

It is conceded that the master list kept by the Board of Elections of Cuyahoga County, for the purpose of checking the validity of petitions filed with the board, lists the registered voters of the county alphabetically and not by ward and precinct.

It is conceded that the records of the Boards of Elections of Cuyahoga County contain the ward and precinct of each registered voter.

It is conceded that the ward and precinct of the petition signer is not required on the petition in order for the board of elections to check whether the person who signed his name and address on the petition is a registered voter of Cuyahoga County.

It is also conceded that since these petitions seek a referendum upon a county-wide tax, every registered voter of Cuyahoga County, regardless of the ward or precinct in which he resides, is eligible to vote upon the question should it be submitted to the electorate.

There is no question raised concerning the eligibility of the circulators of the petitions, the validity of their oaths or signatures, or their conduct in securing signatures on the petitions.

The case of *State, ex rel. Patton, v Myers* (1933), 127 Ohio St. 95, was a mandamus action brought to compel the Secretary of State to direct the boards of elections of the 88 counties *that signers must personally fill in their wards, townships or precincts on referendum petitions.*

The language of the Constitution which was controlling in that case is substantially the same as the language of Section 305.32, Revised Code, which is controlling in the instant case. In that case, this court held that a signer of a referendum petition must personally sign his own name, *but need not personally place on the petition his ward and precinct.*

That court did not have before it in that case the question which is before the court in the instant case.

In *Stevens v. Board of Elections of Henry County* (1957), 108 Ohio App. 37, the Third District Court of Appeals had before it a case similar to the instant case. In that case, the street numbers of the residence of petition signers were omitted from the referendum petition. Paragraph two of the syllabus in that case reads as follows:

"Where a referendum petition signer, an admittedly qualified elector, in a nonregistration area gives after his signature the name of his street but fails to give the number

of his residence, such failure does not validate his signature."

In *State ex rel. Wolson, v. Kelly* (1966), 6 Ohio St. 2d 67, a candidate for Judge of the Court of Appeals of the Sixth Appellate District omitted the precinct in which he resided from his declaration of candidacy. Section 3513.07, Revised Code, sets forth the requirements for such petition. This court stated in the opinion in that case:

"'Voting residence' is defined by Section 3501.01 (J), Revised Code, as follows:

"'"Voting residence" means that place of residence of an elector which shall determine the precinct in which he may vote.'

"Here the relator set forth his residence address. That residence address determines the precinct in which he can vote."

This court held the declaration of candidacy valid.

In *State, ex rel. Ellis, v. Sulligan* (1966), 6 Ohio St. 2d 65, the relator filed a declaration of candidacy and petition for nomination as a candidate for the office of Judge of the Common Pleas Court with the Mahoning County Board of Elections, which petition was rejected as being invalid because the relator, in his declaration of candidacy, failed to indicate the county in which he wished to become a candidate. This court held that the relator had sufficiently complied with the statutory requirements and allowed a writ ordering the board to place his name on the ballot. The same reasoning was used in *State, ex rel. Donofrio, v. Henderson* (1965), 4 Ohio App. 2d 183.

In the instant case, no question is raised concerning the accuracy of the address which follows each signature on the petitions. The residence address of each petition signer

determines the precinct in which he can vote and that precinct and ward are listed in the master list in the records of the board of elections. There is no language in Section 305.32, Revised Code, which states that an otherwise valid signature is to be held invalid because the ward and precinct of the petition signer do not appear on the petition following his signature.

It is admitted that voters do not know the ward and precinct in which they reside.

The position of relator, and respondents Carney and Duffy in their separate answer supporting relator, is that someone—signer, circulator, committee, or designee of a signer, circulator, or committee—must go to the board of elections and engage in the meaningless ritual of copying from the records of the board of elections onto the petitions which are about to be filed with the board of elections, the ward and precinct of the signers of the petitions.

No contention is made that there is any fraud, or that the omission of the ward or precinct on the petition can lead to fraud. No contention is made that the ward or precinct is required in order to check whether the signer is a registered voter of the county. No contention is made that the ward or precinct is required by sound public policy. No allegation is made that the requirement of the ward or precinct on the petitions serves any useful purpose. In fact, no reason is advanced in the petition or brief of relator, or in the separate answer of respondents Carney and Duffy, as to why such a rule of law is required.

What purpose can possibly be served by requiring such a time-consuming, expensive and meaningless ritual to be engaged in, other than the questionable purpose of preventing a referendum on a local tax issue from being submitted

to the electorate and thereby denying to the electorate their right to vote upon that question.

This is an instance where the matter omitted from the petitions is in the records of the board of elections.

See *State, ex rel. Buchanon, v. Stillman* (1967), 12 Ohio St. 2d 13; *State, ex rel. Blackwell, v. Bachrach* (1957), 166 Ohio St. 301; *State, ex rel. Abrams, v. Bachrach* (1963), 175 Ohio St. 257; *State, ex rel. Janasik v. Sarosy* (1967), 12 Ohio St. 2d 5.

Under the circumstances of this case, it is not reasonable to hold that the members of the General Assembly intended that a signature on a referendum petition, otherwise valid, should be considered invalid because the ward and precinct of the petition signer do not appear on the petition following the signature.

Members of the General Assembly are familiar with petitions and know that voters do not know the ward and precinct in which they reside.

It is not a reasonable construction of the language used in Section 305.32, Revised Code, to conclude that the members of the General Assembly deliberately included this super-technicality in the law in order to curb the use of the referendum.

The relator relies upon *State, ex rel. Poor, v. Addison* (1937), 132 Ohio St. 477, which is cited as authority for the decision in *Lynn v. Supple* (1957), 166 Ohio St. 154.

A rule of law, however, is not sound unless the reason upon which it is based is sound.

The only support in the opinion in *Poor, supra*, for the holding in that case is stated at page 480. There, the court states that under the law when a person registers he must

state his ward and precinct, and that no person is entitled to vote or sign a referendum petition unless he is a registered elector. This is an irrelevant, make-weight argument in support of the conclusion in that case. It is a *non-sequitur*. Lists of registered voters may have been kept by ward and precinct at the time, and it is possible that there was not available a county-wide master list of registered voters which included the ward and precinct of each. In 1937, there may have been some unstated reason for enforcing the super-technicality which the court insisted upon in that case. Today, however, no reason exists. *No reason for such a rule is asserted in the petition and brief of relator, or in the answer of respondents Carney and Duffy who support relator's petition.*

The Constitution guarantees the right of referendum to the electorate. Sections 305.31 to 305.46, inclusive, of the Revised Code, were enacted to provide specifically for a referendum with regard to local taxes enacted for local government purposes by county commissioners.

In the absence of any reason being advanced for invalidating an otherwise valid signature upon such super-technicality, this court should hold that the language "shall place on such petition, after his name * * * the ward and precinct, if any" is a directory provision, and that the omission of such award and precinct from the petition following the signer's name does not invalidate the signature.

DUNCAN, J., dissenting. This case brings before us a question of most serious import.

Shall an elector be denied the right to exercise his elective franchise merely because he does not know the ward and precinct in which he resides?

It should be noted at the outset that counsel agree, and the fact is one of which the court may take judicial notice,

that the ordinary voter does not know in which ward and precinct he resides.

The power to petition, for referendum, which is reserved to the people under our Constitution, is a basic and fundamental right, and is a basic part of the elective franchise. It is so basic and fundamental that the Constitution itself provides that "laws may be passed to facilitate their operation, *but in no way limiting or restricting either such provisions or the powers herein reserved.*" Section 1*g*, Article II, Ohio Constitution. (Emphasis added.)

However, both the Constitution and the statutes here involved provide that a signer of a referendum petition *shall* place his ward and precinct after his name.

The problem before this court is whether the failure to do so invalidates the signature of the elector.

In other words, does the use of the word "shall" make this requirement mandatory, so that the absence of this information will invalidate the signature?

This becomes a matter of statutory and constitutional construction.

In interpreting and construing both statutes and the Constitution, one of the most basic and fundamental precepts which a court is required to follow is to give a fair and reasonable construction to the language therein, and to avoid a narrow or unreasonable construction which would lead to absurd or unreasonable consequences.

As we said in the second paragraph of the syllabus in *Castleberry v. Kraft*, 147 Ohio St. 30:

"In the construction of constitutional provisions or legislative enactments unreasonable or absurd consequences should, if possible, be avoided." See, also, 10 Ohio Jurisprudence 2d 137, Constitutional Law, Section 30.

This is especially true in relation to provisions of law relating to the rights of elective franchise. Such provisions must be interpreted to facilitate and promote, not to impair, the right of the individual to exercise his elective franchise.

It is true that courts ordinarily construe the word "shall" as having a mandatory meaning. However, where such construction would be detrimental to the public, it can be, and it has been, determined that in certain instances "shall" is purely directory. 50 Ohio Jurisprudence 2d Statutes, Sections 20 and 23.

This case presents one of the instances where the only reasonable construction that can be given to "shall" is that it is merely directory. To hold otherwise would, in light of the conceded facts, be an unreasonable and absurd construction.

To hold that the insertion in the petition of the ward and precinct of each signer is mandatory is to impose a duty which it is conceded the ordinary citizen cannot fulfill.

A construction that imposes a duty which is conceded cannot be fulfilled by the ordinary voter is manifestly unreasonable. To construe the requirement in the instant case as mandatory imposes a duty which effectively deprives the elector of a right which the Constitution itself provides cannot be impaired.

The only reasonable construction of the requirement of Section 3513.12, Revised Code, that "Each signer shall place * * * after his name * * * the ward and precinct * * *" is that it is directory only and that the failure of a signer to include the ward and precinct in a referendum petition does not invalidate the signature.

This conclusion is strengthened by the fact that in primary day elective procedure the inclusion of the ward and

precinct ordinarily serves no useful purpose. The only time there would be a necessity for this information is in situations where the electoral action is directed to a specific ward or precinct. In City-wide, county wide or state wide elections, no purpose would be served.

Obviously, the framers of the Constitution inserted the requirement of ward and precinct merely for the purpose of identification. See Proceedings and Debates of the Constitutional Convention (1912), page 916, which it was stated by Mr. Cassity that the requirement of ward and precinct "was to enable the signers of these petitions to be easily identified." Such information is not necessary, or, according to respondents, is it used in processing signatures. Where such information is neither necessary nor useful in processing the signatures on the petition, it is patently unreasonable to hold that the absence of such information invalidates the signatures. Neither logic nor reason dictates that result. On the contrary, the only tenable construction would be to hold that the absence of such information does not affect the validity of the signatures.

I am aware that certain decisions of this court disagree with the position I have taken. Ordinarily, I aim a firm believer in the sanctity of legal decisions and *stare decisis*. However, I also believe, as Justice Brandeis said in his dissenting opinion in *Washington ex rel. Dravo v. Dravo*, 264 U. S. 219, 238:

"*Stare decisis* is ordinarily a wise rule of action. But it is not a universal, inexorable command."

Here, we are not concerned with a rule of property under which rights have vested, or with a prescribed rule of conduct on which many have relied in shaping their actions. To hold that the failure to insert the ward and precinct after a signer's name on a petition does not invalidate the

signature would be a salutary rule and have no deleterious result, whereas, the decision of the majority in this case will effectively deprive many persons of their constitutional rights to require that certain legislation be submitted to the vote of the people. For these reasons, I cannot agree with the majority and believe that the writ of prohibition should be denied.

APPENDIX B

Ohio Const., Art. II, §1g

Any initiative, supplementary or referendum petition may be presented in separate parts but each part shall contain a full and correct copy of the title and text of the law, section or item thereof sought to be referred, or the proposed law or proposed amendment to the constitution. Each signer of any initiative, supplementary or referendum petition must be an elector of the state and shall place on such petition after his name the date of signing and his place of residence. A signer residing outside of a municipality shall state the township and county in which he resides. A resident of a municipality shall state in addition to the name of such municipality, the street and number, if any, of his residence and the ward and precinct in which the same is located. The names of all signers to such petitions shall be written in ink, each signer for himself. To each part of such petition shall be attached the affidavit of the person soliciting the signatures to the same, which affidavit shall contain a statement of the number of the signers of such part of such petition and shall state that each of the signatures attached to such part was made in the presence of the affiant, that to the best of his knowledge and belief each signature on such part is the genuine signature of the person whose name it purports to be, that he believes the persons who have signed it to be electors, that they so signed said petition with knowledge of the contents thereof, that each signer signed the same on the date stated opposite his name; and no other affidavit thereto shall be required. The petition and signatures upon such petitions, so verified, shall be presumed to be in all respects sufficient, unless not later than forty days before the election, it shall be otherwise proved and in such event ten additional days shall be allowed for the filing of additional signatures to

such petition. No law or amendment to the constitution submitted to the electors by initiative and supplementary petition and receiving an affirmative majority of the votes cast thereon, shall be held unconstitutional or void on account of the insufficiency of the petitions by which such submission of the same was procured; nor shall the rejection of any law submitted by referendum petition be held invalid for such insufficiency. Upon all initiative, supplementary and referendum petitions provided for in any of the sections of this article, it shall be necessary to file from each of one-half of the counties of the state, petitions bearing the signatures of not less than one-half of the designated percentage of the electors of such county. A true copy of all laws or proposed laws or proposed amendments to the constitution, together with an argument or explanation, or both, against the same, shall be prepared. The person or persons who prepare the argument or explanation, or both, against any law, section or item, submitted to the electors by referendum petition, may be named in such petition and the persons who prepare the argument or explanation, or both, for any proposed law or proposed amendment to the constitution may be named in the petition proposing the same. The person or persons who prepare the argument or explanation, or both, for the law, section or item, submitted to the electors by referendum petition, or against any proposed law submitted by supplementary petition, shall be named by the general assembly, if in session, and if not in session then by the governor. The secretary of state shall cause to be printed the law, or proposed law, or proposed amendment to the constitution, together with the arguments and explanations, not exceeding a total of three hundred words for each, and also the arguments and explanations, not exceeding a total of three hundred words against each, and shall mail, or otherwise distribute, a copy

of such law, or proposed law, or proposed amendment to the constitution, together with such arguments and explanations for and against the same to each of the electors of the state, as far as may be reasonably possible. Unless otherwise provided by law, the secretary of state shall cause to be placed upon the ballots, the title of any such law, or proposed law, or proposed amendment to the constitution, to be submitted. He shall also cause the ballots so to be printed as to permit an affirmative or negative vote upon each law, section of law, or item in a law appropriating money, or proposed law, or proposed amendment to the constitution. The style of all laws submitted by initiative and supplementary petition shall be: "Be it Enacted by the People of the State of Ohio," and of all constitutional amendments: "Be it Resolved by the People of the State of Ohio." The basis upon which the required number of petitioners in any case shall be determined shall be the total number of votes cast for the office of governor at the last preceding election therefor. The foregoing provisions of this section shall be self-executing, except as herein otherwise provided. Laws may be passed to facilitate their operation, but in no way limiting or restricting either such provisions or the powers herein reserved. (Adopted September 3, 1912).

Ohio Const., Art. V, §1

Every citizen of the United States, of the age of twenty one years, who shall have been a resident of the state one year next preceding the election, and of the county, township, or ward, in which he resides, such time as may be provided by law, shall have the qualifications of an elector and be entitled to vote at all elections. (As amended November 6, 1923).

Ohio Revised Code, §305.31

The procedure for submitting to a referendum any resolution adopted by a board of county commissioners pur-

suant to section 322.02, 324.02, 4504.02, 5739.021 [5739.02.1], or 5741.021 [5741.02.1] of the Revised Code shall be as follows:

When a petition, signed by ten per cent of the number of electors who voted for governor at the next preceding general election for the office of governor in the county is filed with the county auditor within thirty days after such resolution is passed by the board of county commissioners requesting that such resolution be submitted to the electors of such county for their approval or rejection, such county auditor shall, after ten days, and not later than four p.m. of the ninetieth day before the day of election, certify the text of the resolution to the board of elections. The county auditor shall retain the petition. The board shall submit the resolution to such electors, for their approval or rejection, at the next succeeding general or primary election held in the county on the first Tuesday after the first Monday in November in any year or on the first Tuesday after the first Monday in May of even numbered years, occurring subsequent to ninety days after the certifying of such petition to the board of elections.

No such resolution shall go into effect until approved by the majority of those voting upon it. Sections 305.31 to 305.41, inclusive, of the Revised Code, do not prevent a county, after the passage of any resolution, from proceeding at once to give any notice or make any publication required by such resolution.

Ohio Revised Code, 305.32

Any referendum petition may be presented in separate parts, but each part shall contain a full and correct copy of the title and text of the resolution sought to be referred. Each signer of any such petition must be an elector of the county in which the election, upon the resolution referred to by such referendum petition, is to be held, and shall place

on such petition, after his name, the date of signing, his place of residence, including street and number, if any, and the ward and precinct, if any. Each part of such petition shall contain the affidavit of the person soliciting the signatures thereto, which affidavit shall state the number of signers of each part and that to the best of his knowledge and belief each of the signatures contained on such part is the genuine signature of the person whose name it purports to be, that he believes such persons are electors of the county, and that they signed such petition with knowledge of the contents thereof. In determining the validity of any such petition, all signatures which are found to be irregular shall be rejected, but no petition shall be declared invalid in its entirety when one or more signatures are found to be invalid except when the number of valid signatures is found to be less than the total number required by section 305.31 of the Revised Code.

The petitions and signatures upon such petitions shall be prima facie presumed to be in all respects sufficient. No resolution submitted to the electors of any county, and receiving an affirmative majority of the votes cast thereon, shall be held ineffective or void on account of the insufficiency of the petitions by which such submission of the resolution was procured, nor shall the rejection, by a majority of the votes cast thereon, of any resolution submitted to the electors of such county, be held invalid for such insufficiency.

Resolutions receiving an affirmative majority of the votes cast thereon, shall become effective on the first day of the month following certification by the board of elections of the official vote on such question.

(See Revised Code, 5739.021)

For the purpose of providing additional general revenues for the county and paying the expenses of administering

such levy, any county may levy a tax at the rate of one-half of one per cent in addition to the tax imposed by section 5739.02 of the Revised Code upon every retail sale made in the county. The tax shall be levied pursuant to a resolution of the county commissioners and a certified copy thereof shall be delivered to the tax commissioner either personally or by certified mail not later than the sixtieth day prior to the date on which the tax is to become effective. Prior to the adoption of any such resolution, the board of county commissioners shall conduct two public hearings thereon, the second hearing to be not less than three nor more than ten days after the first. Notice of the date, time, and place of such hearing shall be given by publication in a newspaper of general circulation in the county once a week on the same day of the week for two consecutive weeks, the second publication being not less than ten nor more than thirty days prior to the first hearing.

A resolution levying a sales tax pursuant to this section shall become effective on the first day of the month following the expiration of sixty days from the date of its adoption, subject to a referendum as provided in sections 305.31 to 305.41, inclusive, of the Revised Code.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 590

RALPH J. PERK,
Cuyahoga County Auditor,
Appellant,

vs.

THE STATE OF OHIO, ON THE RELATION OF
JOHN T. CORRIGAN,
Prosecuting Attorney of Cuyahoga County, Ohio,
Appellee.

MOTION TO DISMISS OR AFFIRM ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

John T. Corrigan,
Prosecuting Attorney of Cuyahoga County, Ohio,
Criminal Courts Building,
1300 East 21st Street,
Cleveland, Ohio 44114,
Counsel for Appellee, John T. Corrigan,
Prosecuting Attorney of Cuyahoga
County, Ohio.

John T. Corrigan,
Assistant Prosecuting Attorney,
Of Counsel.

Power, Griffith, Jones & Bell,
Gerald A. Donahue,
Stanley S. Smith,
100 East Broad Street,
Columbus, Ohio 43215,

Donald M. Rorimer,
Metzenbaum, Gaines, Finley & Stern,
700 Union Commerce Building,
Cleveland, Ohio 44115,

Willis J. Zangerle,
11309 Edgewater Drive,
Cleveland, Ohio,
Attorneys for Appellant

TABLE OF CONTENTS

Questions Presented . . . 1

Statutes Involved . . . 2

Statement . . . 2

Insubstantiality of the Federal Constitutional Questions Involved . . . 3

Conclusion . . . 7

TABLE OF AUTHORITIES

Cases

Gaston v. County School Board, 391 U.S. 430, 20 L. Ed. 2d 716, 88 S. Ct. 1689 (1968) . . . 6

Lassiter v. Northampton County Election Board, 360 U.S. 45, 79 S. Ct. 985, 3 L. Ed. 2d 1072 . . . 6

Lubin v. Supple, 168 Ohio St. 134, 140 N.E.2d 553 (1957) . . . 4

Pope v. Addison, 132 Ohio St. 472, 9 N.E.2d 148 (1937) . . . 4

State ex rel. Kahle v. Rupert Auditor, 90 Ohio St. 17, 122 N.E. 20 (1918) . . . 4

State ex rel. Patton v. Myers, 127 Ohio St. 92, 186 N.E. 812 (1933) . . . 4, 7

Williams v. Rhodes, 393 U.S. 23, 21 L. Ed. 2d 24, 89 S. Ct. 5 (1968) . . . 3

Constitution and Statutes

Constitution of Ohio, Art. II, Sec. 1 . . . 1

Ohio Revised Code:

Sec. 305.31 . . . 1, 3

Sec. 305.32 . . . 1, 2, 6, 8

Sec. 309.09 . . . 2

In the Supreme Court of the United States

OCTOBER TERM 1969

No. 590

RALPH J. PERK
Cuyahoga County Auditor
Appellant
vs.
THE STATE OF OHIO ON THE RELATION OF
JOHN T. CORRIGAN
Prosecuting Attorney of Cuyahoga County, Ohio
Appellee

MOTION TO DISMISS OR AFFIRM ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

QUESTIONS PRESENTED

The appellee suggests that the correct wording of the questions presented in the light of the facts of the case in the Supreme Court of Ohio are as follows:

1. Is a registered voter denied his right "peaceably to assemble and to petition the Government for a redress of grievances" and the electorate as a whole denied the right to vote by the requirement that voters designate their ward and precinct on a referendum petition which seeks to reject the adoption of a permissive county tax by a board of county commissioners?

2. Is a registered voter denied "equal protection of the laws" when Sections 3501.01 and 3513.18 Ohio Revised Code require a voter living in a designated ward and precinct to place, or cause to be placed by another on a referendum petition authorized by such statute, the ward and precinct of the signer?

STATUTES INVOLVED

Ohio Revised Code Sections 305.31 and 305.32 as they were worded at the time the case at bar was considered by the Ohio Supreme Court are relevant. Ohio Constitution Article II Section 1g is not involved and the Ohio Supreme Court held that it need not be decided in this case whether or not Section 1g pertains to referendum only. The proposed referendum in the case at bar is a county wide referendum which depends upon the specific statutory authority of R.C. 305.31 and 305.32. The Supreme Court Ohio referred to the Ohio Constitutional provision primarily because both the constitutional provision and the statute R.C. 305.32 contain the ward and precinct requirement.

STATEMENT

The appellee accepts for the most part the statement of facts and statement of the case set forth by the appellant.

However it should also be noted that the appellant the County Auditor of Cuyahoga County, Ohio in his actions in the matter disregarded Section 309.09 of the Revised Code of Ohio which designates the Prosecuting Attorney as the legal advisor of all county officers and boards. The appellant who is not an attorney at law took upon himself the performance of the serious legal step of rejecting signatures which umimmediately and precisely without consulting the Prosecuting Attorney. This is especially significant in view of the fact that Section 305.31 of the Revised Code of Ohio adopted in December 1967 is a provision unique in Ohio law conferred upon the County Auditor the duty of determining the validity of referendum petitions filed against county permissive taxes and that was the first time that the County Auditor had

occasion to act under the new law. When the Prosecuting Attorney received information as to the aberration of the County Auditor, the latter was informed in writing (delivered to him personally by two assistant prosecuting attorneys including the writer) on May 2, 1968 that he should cease and desist from any plan under which he would engage in the expenditure of time or money in the counting of signatures which did not include the ward and precinct of the signers. The writing further informed the appellant County Auditor that such a counting would be an illegal expenditure of public funds. The record is devoid of any response by the County Auditor, such as is claimed in the last full paragraph on page 4 of the Jurisdictional Statement, and the fact is that no such response was ever made. There was defiance but no rationale.

It is noteworthy that although the dissenting opinion consisted two justices of the Supreme Court of Ohio occupies about four times as much space as the per curiam opinion by five concurring justices, neither of the dissenting opinions even suggests the slightest belief that the ward and precinct requirement contravenes the United States Constitution.

INSUBSTANTIALITY OF THE FEDERAL CONSTITUTIONAL QUESTIONS INVOLVED

The appellant has injected an element of confusion into the consideration of the subject matter of the case at bar by repeatedly referring to Article II, Section 1, of the Ohio Constitution. The fact is that the said constitutional provision relates to a statewide referendum on state statutes. No statewide referendum is concerned in the case. Rather, the legislature of Ohio saw fit, in enacting county permissive taxes, to provide, in addition to the constitutional referendum provided on the statute itself

for a county referendum to be undertaken in timely fashion after adoption of such a permissive tax by a board of county commissioners. It is submitted that there is no constitutional requirement for a county-wide referendum on a county permissive tax.

The appellant has complained (pages 7 and 11 of the Jurisdictional Statement) that the appellee never suggested to the Ohio Supreme Court any purpose for requiring that wards and precincts be designated by signers of referendum petitions. The fact is that there was no necessity to cite or argue a purpose for the requirement to a Court which had three times in the past 30 years decided that ward and precinct designations must be placed on referendum petitions whether it be done by the signer himself or by someone else at his direction and with his authority. *State ex rel. Patton v. Myers*, 127 Ohio St. 93, 186 N.E. 817 (1933); *Poor v. Ashland*, 132 Ohio St. 187, 6 N.E.2d 418 (1937); *Lynn v. Staggs*, 166 Ohio St. 151, 140 N.E.2d 663 (1957). It was not necessary to argue purpose to the Supreme Court of Ohio which had so aptly observed in *Lynn v. Staggs*, 166 Ohio St. 151, 140 N.E.2d 663, at page 168 of the Ohio State Reports:

> Many of the formalities required with respect to referendum petitions (such as the date of signing, the place of residence and ward and precinct of the signer and the certificate and affidavit of the circulator) are designed not merely to obviate fraud but probably principally to help in the checking of the petition by facilitating the identification of the signers and a determination of their qualifications.

The appellant argues at page 8 that the Board of Elections of Cuyahoga County had the information as to wards and precincts in its own records. This is no plea that no purpose is to be served by requiring a peti-

tion signer to include this information. The argument overlooks the fact that there is a population of approximately 1,800,000 in Cuyahoga County, there are 58 municipalities and 9 townships within the county with many duplications of street names and personal names from municipality to municipality, and the law (R.C. 3503.22) does not require that the name of the municipality be designated on the referendum petition or even permit it to be placed thereon. The argument suppresses the fact that the state statutes of Ohio are designed to apply uniformly to eighty-eight (88) counties. To say that the law should apply in a different way in Cuyahoga County, simply because the board of elections of the said county may voluntarily have been able to install more specialized record keeping than other counties enjoy, would be a real discrimination and denial of due process in regard to Cuyahoga County and the other 87 counties of the state, a clear violation of the principle of uniform application of the laws.

The argument also ignores the fact that opponents of a referendum movement must be given a fair opportunity to check on the validity of signatures. The designation of wards and precincts has a salutary effect in identifying signers for this purpose. Likewise Ohio recognizes that signers may withdraw their signatures from referendum petitions until such time as official action has been taken thereon. *State, ex rel. Kahle v. Rogers, Auditor*, 99 Ohio St. 11, 122 N.E. 39 (1918). If a signer's signature is to be withdrawn, its identification by ward and precinct eases the problem especially when it must be identified among 10,000 signatures. Referendum is not a one-way street. The opponents of a referendum, as well as the proponents, are entitled to have their interest reasonably protected by the state.

Not a single one of the citations in the appellant's Jurisdictional Statement stands for any proposition remotely resembling interference with a State's constitutional or statutory provisions as to informational material required on an initiative or referendum petition. It would appear that this deficiency in the Jurisdictional Statement is not accidental or due to lack of diligence. The United States Supreme Court has amply demonstrated its concern for the need to refrain from usurping the authority of the States in areas traditionally entrusted to them. *Green v. County School Board*, 391 U.S. 430, 20 L. Ed. 2d 716, 88 S. Ct. 1689 (1968). Writing for a unanimous court in *Lassiter v. Northampton County Election Board*, 360 U.S. 45, 79 S. Ct. 985, 3 L. Ed. 2d 1072, upholding, against constitutional attack, North Carolina's literacy requirement applicable to voters in all state and federal elections, Justice Douglas said:

> "The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised. *Pope v. Williams*, 193 U.S. 621, 633, 24 S. Ct. 573, 576, 48 L. Ed. 817; *Mason v. Missouri*, 179 U.S. 328, 335, 21 S. Ct. 125, 128, 45 L. Ed. 214, absent of course the discrimination which the Constitution condemns." 360 U.S., at 50-51, 79 S. Ct. at 989.

In the case at bar, no invidious discrimination exists. No one is penalized on the basis of age, race, sex, color, religion, economic status, taxpaying status, or on the basis of having, or not having, a child in school.

The appellant's contentions spring very largely from a false premise. There is a factual error in the first sentence of the paragraph numbered one (1) on page 7 of the Jurisdictional Statement. A like assertion near the end of page eleven (11) of the Jurisdictional Statement that no one knows his ward and precinct designations is

likewise erroneous. It was not stipulated at bar that the electors in Cuyahoga County do not know the number and/or name of the ward and precinct in which they live. Even if many voters are not able at some particular time and without checking with their friends and neighbors, to state their ward and precinct, there was no allegation or evidence that even a single one of the 76,000 signers of the referendum petitions in the case at bar did not know his ward and precinct. Lack of knowledge is no excuse, any more than lack of literacy is an excuse. The referendum drive was a vast promotional effort, guided by a former United States congressman. In such a situation Ohio's liberal rule of permitting the circulator or other persons to place the ward and precinct designation on the petition, *State, ex rel. Patton v. Myers*, 127 Ohio St. 93, lays the blame for omission squarely at the door of the promoters of the referendum drive.

All in all, the case at bar, at the very utmost, falls within the rule noted by Justice Black in the opinion in *Williams v. Rhodes*, 393 U.S. 23, 21 L. Ed. 2d. 24, 89 S. Ct. 5 (1968), when he said, at page 31 of the Lawyers' Edition:

> "It is true that this Court has firmly established the principle that the Equal Protection Clause does not make every minor difference in the application of laws to different groups a violation of our Constitutions."

CONCLUSION

In view of the want of any substantial federal question, the appeal of the County Auditor should be dismissed or the judgment of the Supreme Court of Ohio should be affirmed, and the appellee so moves this honorable court. In addition to the arguments set forth above, it is submitted that there is a large element of mootness in this case. The constitutionality of Ohio's permissive "piggyback"

tax has withstood an onslaught in the U.S. District Court for the Northern District of Ohio and in the Common Pleas Court of Cuyahoga County. The tax went into effect on September 1, 1969, and is being collected at a rate of more that one million dollars ($1,000,000) per month.

Furthermore, it is clear that a decision by this Court on the subject of ward and precinct designations is not needed as a controlling precedent for future cases in Ohio involving county permissive taxes. The General Assembly of Ohio enacted into law an amendment of R.C. 305.32, effective August 18, 1969, which eliminates the words "and the ward and precinct, if any."

Respectfully submitted,

JOHN T. CORRIGAN,
Prosecuting Attorney of
Cuyahoga County, Ohio,

JOHN L. DOWLING,
Assistant Prosecuting Attorney,
Attorneys for Appellee.

SUPREME COURT, U. S.

No. 590

FILED
DEC 4 1969
JOHN F. DAVIS, CLERK

In The

Supreme Court of The United States

RALPH J. PERK, Cuyahoga County Auditor,
Appellant,

v.

THE STATE OF OHIO, ON THE RELATION OF JOHN T. CORRIGAN, PROSECUTING ATTORNEY OF CUYAHOGA COUNTY, OHIO,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

REPLY TO MOTION TO DISMISS OR AFFIRM

POWER, GRIFFITH, JONES & BELL,
By GERALD A. DONAHUE,
STANLEY S. SMITH,
100 East Broad Street,
Columbus, Ohio 43215,
DONALD ROBINER,
Union Commerce Building,
Cleveland, Ohio,
WILLIS J. ZANGERLE,
11309 Edgewater Drive,
Cleveland, Ohio,
Attorneys for Appellant.

JOHN T. CORRIGAN,
Prosecuting Attorney,
JOHN L. DOWLING and A. M. BRAUN,
Assistant Prosecuting Attorneys,
Attorneys for Appellee,

INDEX

Statement 1

Reply to Motion to Dismiss or Affirm 2

Conclusion 5

Appendix 7

CITATIONS

Cases:

State, ex rel. VanderWerf v. Warren, Auditor, et. al., 20 Ohio St. 2d 9 (1969) 3

Statutes:

Ohio Revised Code, §305.32 (as amended) 9

In The

Supreme Court of The United States

October Term, 1969

No. ...

RALPH J. PERK, Cuyahoga County Auditor,
Appellant,

v.

THE STATE OF OHIO, ON THE RELATION OF JOHN T. CORRIGAN, PROSECUTING ATTORNEY OF CUYAHOGA COUNTY, OHIO,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

STATEMENTS

It is obvious from reading the Motion to Dismiss, etc., filed by Appellee, that this controversy had its origins in a heated political squabble. Appellee has seen fit to perpetuate this squabble regardless of the constitutional rights of the people of Cuyahoga County; people who also elected Appellee. Appellant will not reply herein to the statements made in Appellee's Motion to Dismiss because to do so would be to ignore the basic questions of fundamental rights being raised before this Court.

Appellee's Motion to Dismiss charges that Appellant's contentions are founded upon a false premise. Appellee contends that it was not stipulated at bar that the electors in Cuyahoga County do not know their ward and precinct designations. The fact of the matter is that, during *Appellee's* argument, Chief Justice Taft of the Ohio Supreme Court, interrupted the argument to inquire if Appellee

would stipulate that the said electors did not know their ward and precinct. Chief Justice Taft informed Appellee that the Court was prepared to take judicial notice of the fact in any event. Appellee thereupon conceded the point. This fact is evidenced by the dissenting opinions of Judge O'Neill and Judge Duncan contained in the Appendix of Appellant's Jurisdictional Statement. Judge O'Neill stated (Appendix, page 25) that:

> "It is admitted that voters do not know the ward and precinct in which they reside."

Judge Duncan stated (Appendix, page 27) that:

> "It should be noted at the outset that counsel agree, and the fact is one of which the court may take judicial notice, that the ordinary voter does not know in which ward and precinct he resides."

Appellant agrees that lack of knowledge is no excuse in most instances before the law. However, the lack of knowledge stems, not from complacency or basic ignorance, but rather from the fact that an elector does not *need* to know this information to vote. Therefore, to require the elector to supply this information, admittedly difficult to learn, to validate a signature on a referendum petition, is to deny the rights of that elector.

REPLY TO MOTION TO DISMISS OR AFFIRM

The principal purpose of this Reply is to bring to this Court's attention two significant developments which affect the principles involved in this case.

1. Appellee, at page 8 of his Motion, concludes with a mere recital of the fact that R. C. 305.32 was amended effective August 18, 1969. Appellee states that "there is a large element of mootness in this case," and no precedent is needed for future Ohio cases. It is submitted that the fact is that the questions presented herein are not moot to the

1,800,000 persons living in Cuyahoga County, Ohio, who are paying the tax at the rate of more than one million dollars ($1,000,000) per month. The full text of R. C. 305.32, as amended, is set forth in the Supplemental Appendices attached hereto (Appendix A).

While no legislative history is available in Ohio, it is clear that the amendment of R. C. 305.32 was intended to correct the decision of the Ohio Supreme Court in this case. Research of the amending act reveals that the revision of R. C. 305.32 was *added* as an amendment to House Bill 531 (which originally dealt with other portions of Ohio law) *after* the decision of the Ohio Supreme Court, in this case, on June 18, 1969. This then is a recognition, by the Ohio General Assembly that the requirement as to ward and precinct in R. C. 305.32, was not in accord with its opinion of the law. The fact that another case, raising the same issue as this one, is unlikely to appear in Ohio does not lessen impact of the decision below in this case. The fact that the Ohio General Assembly, in effect, overruled the decision of the Ohio Supreme Court in this case, is little consolation to the 1,800,000 who are required to pay the tax without having had an opportunity to vote.

2. The second development is the announcement of the decision in *State ex rel. VanderWerf v. Warren, Auditor*, 20 Ohio St. 2d 9, (Decided October 9, 1969). In this case the same statute was considered by the Ohio Supreme Court, and, again in a prohibition context. The court, however, denied a writ of prohibition in the *VanderWerf* case, and Appellant submits that the opinion clearly shows a change in the court's attitude toward R. C. 305.31, et seq.

The *VanderWerf* case involved, among other issues, the failure of the circulators of the referendum petitions to file a *verified* copy of the county commissioner's resolution

before circulating the petitions. This requirement is imposed by R. C. 305.33 by the following language:

> "Whoever files a referendum petition against any resolution *shall*, before circulating such petition, file a verified copy of the resolution with the county auditor." (Emphasis added)

In approving the use of an unverified, but accurate copy of the resolution, the Court stated:

> "Clearly, the sole purpose of Section 305.33, Revised Code, is to assure, so far as is probable, that a true copy of the particular resolution which the circulators of a referendum petition wish to refer to an election is presented to the voters. We can perceive no valid reason to annul the referendum proceedings in this case, since the statutory purpose has unquestionably been accomplished.
>
> "It is not the apparent legislative intent that an unverified copy of the resolution filed with this county auditor is so critical a defect, *ipso facto*, as to void the referendum proceedings."

This decision, we submit, differs drastically from the strict construction given to the words, in R.C. 305.32, "signer * * * shall place * * *" by the same Court in this case. Absent also is the finding that the requirement is mandatory even though the word "shall" is used in both sections of the law. The Court's major concern is that the *purpose* of the requirement is satisfied. A review of the decision by the court in this case fails to reveal any discussion, by the majority, of a *purpose* for the ward and precinct requirement; in fact the majority opinion does not even mention the purpose of the requirement. Furthermore, the majority of the Court did not consider the *regardless* of the actual purpose of the requirement, the public officials involved actually affirmatively *waived* the benefits of the requirement as the same related to their duty under the law. The requirement that the voters be ad-

vised as to the exact resolution being petitioned is certainly as *crucial* as the ability to verify the validity of signatures on a referendum petition by use of ward and precinct designations.

CONCLUSION

The fact that the Ohio General Assembly has amended Revised Code Section 305.32 establishes that the decision below in this case was contrary to the principles recognized by the legislative body of the State of Ohio. The sales tax in question is being collected so the issues presented herein are not moot.

In addition, the Supreme Court of Ohio, in a later case, in its interpretation and construction of the statutes covering the sales tax has taken a position that is totally inconsistent with its position in this case.

Respectfully submitted,

POWER, GRIFFITH, JONES & BELL

By .....
GERALD A. DONAHUE

By .....
STANLEY S. SMITH

100 East Broad Street
Columbus, Ohio 43215

DONALD M. ROBINER
METZENBAUM, GAINES, FINLEY & STERN
700 Union Commerce Building
Cleveland, Ohio 44115

WILLIS J. ZANGERLE
11309 Edgewater Drive
Cleveland, Ohio

Counsel for Appellant.

Ohio Revised Code §305.32

Any referendum petition may be presented in separate parts, but each part shall contain a full and correct copy of the title and text of the resolution sought to be referred. Each signer of any such petition must be an elector of the county in which the election, upon the resolution referred to by such referendum petition, is to be held, and shall place on such petition, after his name, the date of signing, his place of residence, including street and number, if any. Each part of such petition shall contain the affidavit of the person soliciting the signatures thereto, which affidavit shall state the number of signers of each part and that to the best of his knowledge and belief each of the signatures contained on such part is the genuine signature of the person whose name it purports to be, that he believes such persons are electors of the county, and that they signed such petition with knowledge of the contents thereof. In determining the validity of any such petition, all signatures which are found to be irregular shall be rejected, but no petition shall be declared invalid in its entirety when one or more signatures are found to be invalid except when the number of valid signatures is found to be less than the total number required by section 305.31 of the Revised Code.

The petitions and signatures upon such petitions shall be prima facie presumed to be in all respects sufficient. No resolution submitted to the electors of any county, and receiving an affirmative majority of the votes cast thereon, shall be held ineffective or void on account of the insufficiency of the petitions by which such submission of the resolution was procured, nor shall the rejection, by a majority of the votes cast thereon, of any resolution submitted to the electors of such county, be held invalid for such insufficiency.

Resolutions receiving an affirmative majority of the votes cast thereon, shall become effective on the first day of the month following certification by the board of elections of the official vote on such question.

SUPREME COURT OF THE UNITED STATES

October Term, 1969

PERK, CUYAHOGA COUNTY AUDITOR *v.* OHIO EX REL. CORRIGAN, PROSECUTING ATTORNEY

APPEAL FROM THE SUPREME COURT OF OHIO

No. 590. Decided December 8, 1969

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.